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In The

Supreme Court of The United States

No. _____

_____ 76-1775

ROBERT G. BENSING,

Petitioner-Appellant

v.

UNITED STATES OF AMERICA,

Defendant-Appellee

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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INDEX

	Page
Table of Authorities	v
Citation to Opinion Below	1
Statement of Jurisdiction	2
Questions Presented for Review	2
Federal Statutes, Rules and Regulations Involved	11a
Statement of the Case	3
A. Procedural History	3
B. The Facts	5
Reasons for Granting the Writ	8
I. Certiorari should be granted because: that portion of 10 U.S.C. § 8287, which congress enacted in 1956 as Section 207 of the Armed Forces Regular Officer Augmentation Act, violates the due process clause of the fifth amendment in granting promotion credit to Bensing's career contemporaries who served with him in World War II, if they were over 21 years of age, and denying such credit to Bensing and others for concurrent service performed prior to becoming 21 years of age; that said 1956 Act is unlawfully discriminatory, and is based upon a false and irrational	

Page

premise, namely that Congress could and should modify the 1947 Officer Personnel Act retroactively to grant promotion credit for wartime service as commissioned officers to one group while denying it to another group solely on the basis of age, even though both groups had accepted regular commissions under the 1947 Act and had prior concurrent service in wartime and thereafter; and further, that the denial of promotion credit for those who served as commissioned officers in wartime while under 21 years of age was designed primarily as an unwarranted protective device for the young men who spent the war years as cadets in the sanctuary of the United States Military Academy. . . 8

II. Certiorary should be granted because: Bensing was wrongfully denied consideration for promotion due to an admitted error in his military personnel records. Since he was not considered, he could not be promoted, and the lower courts improperly placed the burden of proving damages upon Bensing. 18

Page

III. Certiorari should be granted because: immediately upon the implementation of the 1956 Statute, retroactively granting promotion credit for wartime service only to those who were 21 years of age during such service, Bensing's relative position for promotion, his time-in-grade, and his rank dropped drastically compared to that of his wartime career contemporaries who were 21 years of age during World War II and received the retroactive promotion credit for World War II commissioned service which Bensing was denied. No such provision was incorporated in the 1947 Act under which Bensing received appointment to a Regular commission in 1972. The 1947 Act provided credit only for commissioned service performed after the passage of the Act, a clearly constitutional and non-discriminatory legislative enactment even though no appointment or credit for promotion prior to Age 21 was provided. No retroactive grant or denial of credit for service performed prior to the passage of the Act was included. Bensing's career was shattered by the 1956 retroactive deprivation of rights, privileges and property, and his career contemporaries moved inexorably ahead in career progression.

Page

This discriminatory deprivation of promotion credit for World War II service alone would have prevented normal career progression. When combined with the admitted administrative error and the effect of the 1959 Officer Grade Limitation Act (which allowed the Air Force to convert promotion criteria based upon "time-in-grade" to a dual basis of "Promotion List Service Date" and "time-in-grade"). The result was inevitably the two pass-overs for promotion which required his involuntary early retirement as a major after many years of exemplary service to his country in war and peace as a commissioned officer in the armed forces. 20

Conclusion 25

Appendix A 1a

Appendix B 8a

Appendix C 11a

Page

I. CASES

Accord, In the Matter of Patricia A., ... 13
31 N.Y. 2d 83, 355 N.Y. 2d 33 (1972)

Armstrong v. Howell, ... 14
371 F. Supp. 48 (D.Neb. 1974)

Blassman v. Markworth, ... 14
359 F. Supp. 1 (N.D. Ill. 1973)

Bolling v. Sharpe, ... 9
347 U.S. 497 (1954)

Cleveland Board of Education v. 14
LaFleur, 414 U.S. 632 (1974)

Commonwealth v. Daniels, ... 12
430 Pa. 642, 243 A.2d 400 (1968)

Cooper v. Nix, 343 F. Supp. 1101 14
(W.D. La. 1972), aff'd as modified,
496 F.2d 1285 (5th Cir. 1974)

Dunn v. Blumstein, ... 10
405 U.S. 330 (1972)

Human Rights Party v. Secretary of 14
State for Michigan, 370 F. Supp. 921
(E.D. Mich. 1973)

Kahn v. Shevin, ... 13
416 U.S. 351 (1974)

Lamb v. Brown, ... 13,15
456 F.2d 18 (1972)

Page

Levy v. Louisiana, ... 11
391 U.S. 68(1968)

Manson v. Edwards, ... 14
482 F.2d 1076 (6th Cir. 1973)

Murgia v. Commonwealth of 14
Massachusetts Board of Retirement,
376 F. Supp. 753 (D Mass. 1974)

Reed v. Reed, ... 10
404 U.S. 71, 76 (1971)

Royster Guano Co. v. Virginia, ... 10
253 U.S. 412, 415 (1920)

Schlesinger v. Ballard, ... 9
419 U.S. 498, 500 n.3 (1975)

Shapiro v. Thompson, ... 9
394 U.S. 618, 642 (1969)

Skinner v. Oklahoma, ... 11,15
316 U.S. 535 (1942)

United States v. Duncan, ... 14
456 F.2d 1401 (9th Cir.),
vacated on other grounds,
409 U.S. 814 (1972)

Vlandis v. Kline, ... 14
412 U.S. 441 (1973)

Weiss v. Walsh, ... 14
324 F. Supp. 75 (S.D.N.Y. 1971),
aff'd, 461 F.2d 846 (2d Cir. 1972)

Page

II. STATUTES

Title 10 U.S.C. § 8287, Section 207
of the Regular Officer Augmentation
Act of 1956. . . . . 2 et seq.

Section 506 (c) of the Armed
Forces Regular Officer
Augmentation Act of 1947
(repealed). 21,22

Legislative History of
Section 203 (d)
Regular Officer Augmentation
Act of 1956, U.S. Code
Congressional and Administra-
tive News, 1959, at page 3369. 17

Legislative History of
10 U.S.C. 8202, 1959 Officer
Grade Limitation Act, U.S. Code
Congressional and Administrative
News, 1959, at page 2694. 6,21

Section 27, Public Law 85-861,
1957, amending 10 U.S.C. 8287,
8888 and 8927. 7

III. OTHER AUTHORITIES

Developments in the Law:
Equal Protection
82 Harv. L. Rev. 1965 (1969) 9

IN THE SUPREME COURT OF THE UNITED STATES

No._____

ROBERT G. BENSING, Petitioner-Appellant

vs.

UNITED STATES OF AMERICA, Defendant-Appellee

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES OF COURT OF APPEALS
FOR THE TENTH CIRCUIT

Petitioner Robert G. Bensing prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Tenth Circuit, (the "Court of Appeals") entered March 22, 1977, in the case of Robert G. Bensing, Petitioner-Appellant, vs. United States of America, Defendant-Appellee, Case No. 76-1125, which affirms the order of the United States District Court for the District of Colorado (the "District Court") entered on December 23, 1975, denying the relief sought by the Petitioner-Appellant and dismissing his cause of action, Case Number C-5181 in the District Court.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit in Robert G. Bensing, Petitioner-Appellant, vs. the Unites States of America, Defendant-Appellee, Case No. 76-1125, was filed March 22, 1977, and to the best of Petitioner's knowledge is not yet reported. A copy of this opinion is appended hereto as Appendix A.

STATEMENT OF JURISDICTION

Petitioner seeks a Writ of Certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit entered March 22, 1977, in the case of Robert G. Bensing, Petitioner-Appellant, vs. United States of America, Defendant-Appellee, Case No. 76-1125, citing Title 28 U.S.C. §1254 which provides that:

> Cases in the courts of appeals may be reveiwed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree...

This statute is believed to confer on the Supreme Court of the United States jurisdiction to review by Writ of Certiorari the decision of the Tenth Circuit Court of Appeals affirming the denial of relief to the Plaintiff-Appellant and the dismissal of his cause of action by the District Court.

QUESTIONS PRESENTED FOR REVIEW

1. Does 10 U.S.C. 8287(a)(1) deny Robert G. Bensing, Plaintiff-Appellant, due process of law under the Federal Constitution by failing to permit credit towards promotion for active commissioned military service performed before the age of 21 years?

2. Did the District Court commit error by denying Robert G. Bensing's claim for relief as a result of Bensing's having been wrongfully denied consideration for promotion due to an admitted error in Bensing's military records?

3. Is not the statute unfair and discriminatory and designed, not to grant promotion credit

for time served, but solely to deprive a very limited group of young wartime officers, including Bensing, of earned and deserved promotion credit while protecting another limited, though influential group, namely service academy graduates who were cadets in the protected sanctuary of the Academy during World War II?

4. Did not the combined effect of deprivation of credit for wartime service and admitted administrative error result in Bensing's failure to be promoted beyond the grade of major and prematurely terminate his career in that relatively low grade after more than 22 years active duty as a commissioned officer during three separate conflicts?

STATEMENT OF THE CASE

A. Procedural History

The parties will be referred to as follows: Plaintiff-Appellant will be referred to as "Bensing"; Defendant-Appellee will be referred to as "United States."

Action No. C-5181 was commenced in the United States District Court, District of Colorado, by Bensing, a retired military officer, alleging that the United States has wrongfully denied him credit towards promotion for commissioned military service which was performed before Bensing reached the age of 21 years. Additionally, Bensing alleged that an error in his personnel records was wrongfully permitted to exist and said error caused Bensing to be denied consideration for promotion with Bensing's contemporaries. Robert G. Bensing is a retired air force officer who was involuntarily retired on October 31, 1971, in the grade of Major.

The United Stated denied the allegations of the Complaint and asserted lack of jurisdiction, failure to state a claim upon which relief may be granted, laches, and res judicata.

The matter was tried to the Court in the United States District Court for the District of Colorado on November 17, 1975. Following the trial, the District Court Judge entered findings of fact into the record and ruled that the burden of proof was upon Bensing to prove, that had an error not existed in his personnel record he would have received a promotion in the fiscal year 1961. The Court ruled that Bensing did not sustain this burden of proof and denied his claim upon its merits. The Court also entered findings of fact with regard to Bensing's claim for relief which alleged the unconstitutionality of 10 U.S.C. 8287. The Court then requested counsel to file briefs on the constitutionality of 10 U.S.C. 8287. After having received and considered the briefs of the parties dealing with Bensing's claim that 10 U.S.C. 8287 violates Bensing's right to equal protection of the law under the Federal Constitution, the Court entered Findings of Fact and Conclusions of Law on December 23, 1975.

The District Court ruled that Bensing failed to sustain his burden of proving damage resulting from the erroneous entry made by the United States in his personnel records, and that Bensing is not entitled to recover thereon. The Court also ruled that 10 U.S.C. 8287, has a rational basis for the discrimination therein as between those who had service as commissioned officers prior to the age of 21 years and those commissioned officers who had no such service prior to the age of 21 years, and that this discrimination is not invidious and does not and did not violate Bensing's constitutional rights. Therein followed a judgment of dismissal of Bensing's Complaint.

An appeal was taken to the United States Court of Appeals, 10th Circuit, which affirmed the judgment and order of the District Court.

B. THE FACTS

Bensing's military record is conclusive with regard to the following facts:

Bensing entered the armed forces on February 2, 1943, as a private in the United States Army. He later entered pilot training in the United States Army Air Corps and was commissioned a Second Lieutenant on March 12, 1944. He then was trained and began active commissioned service as a pilot of a B-17 bomber aircraft. Bensing's military records indicate that he participated in combat missions and was decorated and awarded an Air Medal prior to May 18, 1945, at which time he attained the age of 21 years. Bensing served on active duty until November 28, 1945, when he accepted an appointment in the reserve forces in the grade of first lieutenant. On April 15, 1951, Bensing was recalled to extended active duty and served continuously until his involuntary retirement on October 31, 1971, in the grade of major.

The Officer Personnel Act of 1947 provided for the appointment of Regular officers after the date of the Act and included an age requirement of 21 years. The Act also provided that for purposes of determining grade, promotion and seniority as a Regular officer in the air force, an officer could only receive credit at the time of his regular appointment for all active commissioned service which occurred after the officer's 21st birthday, and after the date of the Act. On October 15, 1952, Bensing accepted an appointment as a second lieutenant

in the regular air force. Bensing's status as a Regular officer meant more than a declaration of an intention to be a career military officer. Regular officers, when compared with Reserve officers, can expect a greater opportunity for promotion in the secondary zone. Additionally, from 1959 until 1971, Regular officers dominated secondary zone promotions among field grade officers (major and above).

On November 19, 1956, an erroneous entry in Bensing's personnel records established his Promotion List Service Date (PLSD) as January 15, 1951. This error was not corrected until January 18, 1961, at which time Bensing's records were corrected to reflect the PLSD of September 19, 1950. The significance of a PLSD was increased by the Officer Grade Limitation Act of 1959. The effect of this Act was to convert from a time-in-grade criteria to a dual criteria of Promotion List Service Date and time-in-grade for promotions.

It is undisputed that Plaintiff-Appellant was not considered for promotion to the grade of major in the secondary zone due to an incorrect PLSD. In FY 1961, Captain Bensing, because of his military record, time-in-grade, and Regular officer status, had reason to believe he would be competitive when considered for promotion to the grade of major in the secondary zone. Regular officers dominated secondary zone promotions. In FY 1960, of the 19.9% of the secondary zone selectees for major, 91.6% were Regular officers. In FY 1961, of the 9.1% of the secondary zone selectees for major, 90.7% were Regular officers.

The United States provided Bensing no means, by regulation or otherwise, to inform promotion boards which considered Bensing subsequent to

FY 1961 of the error which caused Bensing to be considered one year later than his peers. Were it not for 10 U.S.C. 8287, Bensing would have been permitted to add 14 months of commissioned service for the purpose of determining grade, position on promotion lists, and seniority in grade. Were it not for the effect of the cited statute, Bensing would have advanced earlier to the grade of major and would have been paid the appropriate higher rate of compensation. His carrer progression would have been normal and he would have advanced with his career contemporaries of World War II. Instead, because of the error compounded by the statutory loss of standing, normal progression ceased and his career was doomed to premature termination.

The promotion credit loss could have been minimized by use of the statutory authority provided in Section 27 of Public Law 85-861, 1957, but Bensing's records were obviously in shambles and remained so until the time of his involuntary retirement when his certificate of discharge reflected an incorrect date of entry to extended active duty. Section 27 of PL 85-861 provides as follows:

> Notwithstanding any other provision of law, the years of service credited to an officer of the Regular Air Force on July 20, 1956, for the purposes of Section 8287, 8888(2)(A)-(C) and (E)-(G), and 8927(a) (1)-(3) and (5)-(7) and (b)(2) of Title 10, United States Code (this section and sections 8888(2) (A)-(C), (E)-(G) and 8927(a) (1)-(3), (5)-(7), (b)(2) of this title), may be increased but not by more than two years, under regulations to be prescribed by the Secretary of the Air Force.

REASONS FOR GRANTING THE WRIT

I

CERTIORARI SHOULD BE GRANTED BECAUSE: THAT PORTION OF 10 U.S.C. § 8287, WHICH CONGRESS ENACTED IN 1956 AS SECTION 207 OF THE ARMED FORCES REGULAR OFFICER AUGMENTATION ACT, VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT IN GRANTING PROMOTION CREDIT TO BENSING'S CAREER CONTEMPORARIES WHO SERVED WITH HIM IN WORLD WAR II, IF THEY WERE OVER 21 YEARS OF AGE, AND DENYING SUCH CREDIT TO BENSING AND OTHERS FOR CONCURRENT SERVICE PERFORMED PRIOR TO BECOMING 21 YEARS OF AGE; THAT SAID 1956 ACT IS UNLAWFULLY DISCRIMINATORY, AND IS BASED UPON A FALSE AND IRRATIONAL PREMISE, NAMELY THAT CONGRESS COULD AND SHOULD MODIFY THE 1947 OFFICER PERSONNEL ACT RETROACTIVELY TO GRANT PROMOTION CREDIT FOR WARTIME SERVICE AS COMMISSIONED OFFICERS TO ONE GROUP WHILE DENYING IT TO ANOTHER GROUP SOLELY ON THE BASIS OF AGE, EVEN THOUGH BOTH GROUPS HAD ACCEPTED REGULAR COMMISSIONS UNDER THE 1947 ACT AND HAD PRIOR CONCURRENT SERVICE IN WARTIME AND THEREAFTER; AND FURTHER, THAT THE DENIAL OF PROMOTION CREDIT FOR THOSE WHO SERVED AS COMMISSIONED OFFICERS IN WARTIME WHILE UNDER 21 YEARS OF AGE WAS DESIGNED PRIMARILY AS AN UNWARRANTED PROTECTIVE DEVICE FOR THE YOUNG MEN WHO SPENT THE WAR YEARS AS CADETS IN THE SANCTUARY OF THE UNITED STATES MILITARY ACADEMY.

Title 10 U.S.C. 8287(a)(1) creates two classes of commissioned officers for purposes of determining grade, position on a promotion list, and eligibility for promotion in the Air Force. On the one hand are all persons commissioned after becoming 21 years of age; on the other, all persons who received their commission before reaching age 21. Persons in the former class receive credit

towards promotion for all service performed after commission, while those in the latter class are denied credit for any amount of service performed after commission but prior to their becoming 21 years of age. The result of this classification is to prejudice all persons in the latter class in that, by operation of 10 U.S.C. § 8287 (a)(1), they are not promoted as quickly as persons who have served under commission for the exact same period but who fortuitously happened to have been commissioned after reaching 21 years of age. Bensing, who was commissioned as a second lieutenant on March 12, 1944, but who did not become 21 until May 18, 1945, was so prejudiced by losing credit for approximately 14 months post-commission service as a result of this challenged section.

Because the statute in question is a federal statute, any constitutional challenge based on an invidious descrimination contained therein must be predicated upon the Due Process Clause of the fifth amendment. The Due Process Clause of the fifth amendment, however, incorporates all of the requirements of the Equal Protection Clause of the fourteenth amendment. See Schlesinger v. Ballard, 419 U.S. 498, 500 n.3 (1975); Shapiro v. Thompson, 394 U.S. 618, 642 (1969); Bolling v. Sharpe, 347 U.S. 497 (1954).

In recent years Supreme Court decisions have developed a "two-tiered" scrutiny under the Equal Protection Clause, Developments In The Law: Equal Protection, 82 Harv. L. Rev. 1065 (1969), in which the degree of tolerance or latitude permitted a statutory classification will depend upon the interests affected by the classification or the nature of the classification itself.

Where the classification is "suspect," i.e., drawn along racial or other constitutionally impermissible lines such as alienage, or where the interest affected by the classification is fundamental, i.e., an interest protected explicitly or implicitly by the Constitution itself, then the statute is subjected to the strictest of scrutiny. It must be in furtherance of a compelling state interest and must be drawn in such a way that the only way in which the interest can be realized is by the statutory scheme in question. Dunn v. Blumstein, 405 U.S. 330 (1972). Where, however, neither a fundamental interest nor a suspect classification is implicated by the statute, then the lines drawn by the statute are permitted greater leeway and the only requirement is that the "classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly situated shall be treated alike.'" Reed v. Reed,404 U.S. 71, 76 (1971), quoting from Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). It is submitted that in the case at bar the failure to give credit for purposes of promotion for commissioned service performed prior to age 21 fails to meet these constitutional tests, that the exclusion of such service is fundamental because it deals with an important aspect of the armed forces, is "suspect" because it discriminates solely on the basis of age, and if not regarded as fundamental or "suspect", it is arbitrary and bears no reasonable relation to any legitimate governmental objective.

Bensing, at age 19, proved himself to be worthy of commission as a second lieutenant and in that capacity to serve as an aircraft commander

flying combat missions. He did exactly what other commissioned officers did, nothing different. Because he was not then 21 years old, however, 10 U.S.C. § 8287 (a)(1) deprives him of credit for the period of such service performed prior to his twenty-first birthday. There is no rational basis for treating two persons performing the same service differently for purposes of promotion merely because of their age, and more especially so when it involves a retroactive grant of additional rights, privileges and property several years after the service was performed. Such arbitrary differentiation strikes at the very essence of the prohibition against denial of equal protection under both the fourteenth and fifth amendments.

In Skinner v. Oklahoma, 316 U.S. 535 (1942), the Supreme Court held an Oklahoma statute which required sterilization of some "habitual criminals" but not others to be unconstitutional, stating, at 541-42:

> When the law lays an unequal hand on those who have committed intrinsically the same quality of offense ..., it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment... The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn.

In Levy v. Louisiana, 391 U.S. 69 (1968), the Court found a Louisiana statute which precluded illegitimate children from recovering for the wrongful death of their mother to be unconstitutional when legitimate children in exactly

the same position could recover. In so holding, the Court said:

> Why should the illegitimate child be denied rights merely because of his birth out of wedlock? He certainly is subject to all the responsibilities of a citizen, including the payment of taxes and conscription under the Selective Service Act. How under our constitutional regime can he be denied correlative rights which other citizens enjoy?
>
> Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. These children, though illegitimate, were dependant on her; she cared for them and nurtured them...(391 U.S. at 71-72.)

In another setting, disparate treatment of persons otherwise in exactly the same position was found to be constitutionally offensive in Commonwealth v. Daniels, 430 Pa. 642, 243 A2d 400 (1968), in which the Pennsylvania Supreme Court struck down Pennsylvania's Muncy Act, which provided for harsher sentences for women than for men convicted of the same crime. In so doing, the court held, 243 A.2d at 403-404, as follows:

> A Classification by sex alone would not, per se, offend the Equal Protection Clause of the United States Constitution. For example, there are undoubtedly significant biological, natural and practical differences between man and women which would justicy, under certain circumstances, the establishment of different employment qualification standards. ...

> We are convinced, however, that the considerations and factors which would justify a difference between men and women in matters of employment, as well as in a number of other matters, do not govern or justify the imposition of a longer or greater sentence of women than is imposed upon men for the commission of the same crime.

In a similar kind of case, the Tenth Circuit Court of Appeals has held an Oklahoma statute to be unconstitutional in providing for criminal treatment of males over 16 years of age, while not providing for similar treatment for girls until they reached 18. Lamb v. Brown, 456 F.2d 18 (1972). The Court stated, at 20:

> We have not been presented with a logical constitutional justification for the discrimination inherent in (the statute). The State, in its brief and oral argument has simply relied upon the unexplained "demonstrated facts of life." Because the purpose of the disparity in the age classification between 16-18 year old males and 16-18 year old females has not been demonstrated, we hold that (the statute) is violative of the equal protection clause.
>
> Accord, in the Matter of Patricial A., 31 N.Y. 2d, 355 N.Y. 2d 33 (1972).

Age classifications, like classifications by sex, may be constitutional where they reflect some real difference. See, e.g., Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin,

416 U.S. 351 (1974). In the usual case involving classifications by age, persons either below or above a particular age are prohibited from engaging in some activity because of a presumed inability attributable to early or advanced age. Manson v. Edwards, 482 F.2d 1076 (6th Cir. 1973) (upholding minimum age of 25 for school board); United States v. Duncan, 456 F.2d 1401 (9th Cir.), vacated on other grounds, 409 U.S. 814 (1972) (upholding minimum age of 21 for grand jury service); Murgia v. Commonwealth of Massachusetts Board of Retirement, 376 F. Supp. 753 (D. Mass.1974) (three judge court) (holding mandatory retirement age of 50 for state police to be unconstitutional); Armstrong v. Howell, 371 F. Supp. 48 (D.Neb. 1974) (upholding mandatory retirement age of 65); Human Rights Party v. Secretary of State for Michigan, 370 F. Supp. 921 (E.D. Mich.1973) (three judge court) (upholding minimum age of 18 to run for school board); Blassman v. Markworth, 359 F. Supp. 1 (N.D.Ill. 1973) (three judge court) (upholding minimum age of 21 to run for school board); Cooper v. Nix, 343 F. Supp. 1101 (W.D. La. 1972), aff'd as modified, 496 F.2d 1285 (5th Cir. 1974) (finding regulations requiring students to live on campus to be unconstitutional); Weiss v. Walsh, 324 F. Supp. 75 (S.D.N.Y. 1971), aff'd 461 F.2d 846 (2d Cir. 1972) (upholding mandatory retirement age of 65). In the case at bar, for example, were persons under the age of 21 precluded from receiving a commission as a second lieutenant, Bensing's constitutional challenge would be far more difficult. Such a case might conceivably give rise to a due process attack based upon irrebuttable presumptions, se, e.g., Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Vlandis v. Kline, 412 U.S. 441 (1973). The opposite is true in this case. Bensing was not prohibited from serving as a

second lieutenant. Based upon an assessment of his capabilities and maturity, he was commissioned when only 19 years of age and was given the awesome responsibility of flight crew commander flying combat missions during World War II. Given the fact that a judgment was made as to Bensing's ability to serve, notwithstanding his young age, there can be no rational purpose for precluding him from receiving credit towards promotion for the period of time served as a second lieutenant prior to attaining age 21. Just as in Skinner v. Oklahoma, supra, and Levy v. Louisiana, supra, when people are identically situated, arbitrary distinction cannot constitutionally justify treating certain of those people differently than others. The Tenth Circuit so held in Lamb v. Brown, supra, when it refused to uphold the Oklahoma statute in the absence of "a logical constitutional justification for the discrimination..." The constitutional invalidity of 10 U.S.C. § 8287(a)(1) would be more strikingly apparent, but no different analytically, were second lieutenants under 21 years of age paid a lower rate of pay than those over 21 doing exactly the same job with similar service experience. Such an arbitrary and irrational provision would have been insupportable at the time the service was being performed, but in this case, since persons under 21 serving as commissioned officers were retroactively deprived of equal credit towards promotion for that time served, they are, according to the statutory scheme in question, in a very real sense receiving less compensation for that period of service than persons who were over 21 years of age, and who in addition to their other compensation, were unknowingly building up credits towards promotion, credits denied to Bensing.

By way of judicial knowledge, this Honorable Court should consider American History which followed December 7, 1941. The United States was at war, and all patriotic able-bodied persons rose to meet this challenge. Among those persons was Robert G. Bensing, who, while in his teens, enlisted for military service. After having completed pilot training, Bensing was commissioned an officer and given the responsibility as the pilot and aircraft commander of a four engined bomber. The United States at this time had no reluctance to recognize Bensing's authority or status as an office in command of the combat crew including other commissioned officers who were very likely over 21 years of age. He was ordered to perform combat missions and to be responsible for the lives of the crewmen on board his aircraft. Hypothetically speaking, Bensing's peers who had passed the age of 21 years were accruing time in grade that would considerably enhance their promotion opportunity, while Bensing was not, although simultaneously exposed to the same hazards of combat. While not involved in flying, he wore the same uniform and was entitled to the same military courtesies and privileges. The law then in existence provided for the same pay and other emoluments for officers of the same grade and longevity in service, regardless of age.

During the Korean Conflict, the Defendant again found reason to rely upon Bensing for military service. He was recalled to extended active duty. With his combat experience, his recently acquired college degree, and his professional engineering certificate, Bensing was a prime and attractive candidate to the United States when selecting reserve officers to be appointed to the Regular Air Force. On October 15, 1952, Bensing became a

second lieutenant in the Regular Air Force. Regular officer status has traditionally and historically meant more frequent and rapid advancement in grade when compared with reserve officers of similar experience and ability.

The inference has been made above that the age requirement was included in the 1956 Act to benefit former United States Military Academy cadets, who could not graduate before reaching 21 years of age. Such protective devices are not uncommon, and in some instances are clearly delineated. In fact, the Legislative History of the 1956 Act, as set forth in the U.S. Code Congressional and Administrative News, Volume 2, 1956, at page 3369, discusses such a protective device in Section 203(d), although it is not directly related to this case:

(d) PROTECTION OF PROMOTION SENIORITY OF ACADEMY GRADUATES WITH CONTINUOUS SERVICE.

The purpose of this subsection is to insure the promotion seniority of Academy graduates now on the Regular list with regard to classmates who may receive Regular appointments under this title. It provides for two things: (1) That no person who was a cadet at one of the Academies may be appointed with a date of rank prior to the date received by his classmates who were graduated and appointed as officers, and (2) that no person who was a cadet but did not graduate from an Academy may be credited with a longer period of promotion-list service at the time of his appointment than is credited to his former

classmates now on the Regular list. This subsection is a restatement of existing law.

The protection provided by Section 207 is more subtle, since it purports to award promotion credit to those over 21 rather than to deprive those under 21 of equally deserved credit which might allow them to move to higher rank than a wartime academy cadet of the same age, even though academy graduates have many well recognized advantages in career progression over other Regular officers.

Only in the direst emergency such as World War II does the nation commission 19 year olds, give them command over the lives of their comrades and the operation of complicated war machines. Only a relatively few young men are qualified for such service. No statute depriving them of credit for such service can escape the label "invidious, irrational, discriminatory, and unconstitutional."

II

CERTIORARI SHOULD BE GRANTED BECAUSE: BENSING WAS WRONGFULLY DENIED CONSIDERATION FOR PROMOTION DUE TO AN ADMITTED ERROR IN HIS MILITARY PERSONNEL RECORDS. SINCE HE WAS NOT CONSIDERED, HE COULD NOT BE PROMOTED, AND THE LOWER COURTS IMPROPERLY PLACED THE BURDEN OF PROVING DAMAGES UPON BENSING.

The District Court and the Court of Appeals committed error by denying Bensing's Claim for damages as a result of his having been wrongfully denied consideration for promotion due to an admitted error in his military personnel records.

It is an admitted fact in the record that Bensing's Promotion List Service Date was incorrect from November 19, 1956 until January 18, 1961. Bensing's PLSD was then changed from January 19, 1951, to September 19, 1950. The Defendant also admitted that Bensing should have been eligible for consideration for temporary promotion to the grade of major in the secondary zone in the fiscal year 1961. However, because of the erroneous PLSD, Bensing was not considered for temporary promotion to the grade of major in the secondary zone until fiscal year 1962.

The District Court and the Court of Appeals have erroneously ruled that in order for Bensing to establish a claim for which relief can be granted, he must bear the burden of proving damages by showing that he was not promoted due to the incorrect Promotion List Service Date. Because of the complexity of the military promotion system, it is virtually impossible for anyone but the Defendant to carry this burden of proof. Exhaustive efforts in pretrial discovery failed to elicit much of the pertinent information from the Defendant. The burden of showing lack of damage should be upon the Defendant since such proof, if it exists, is in the hands of the Defendant. Further, the Defendant alone was responsible for the failure of an absolute contingency upon which promotion rested, namely, that Bensing's name be submitted to the promotion board for consideration. This failure standing alone should be sufficient to shift any burden of proof from Bensing to the Defendant.

Efforts to obtain statistics demonstrating the effect of the admitted error, and the rare nature of retirement as a major from the Air Force under circumstnaces involving the quality and quantity of service such as that performed by

Bensing, were unavailing, as revealed in the answers provided to Plaintiff-Appellant's interrogatories by the Defendant-Appellant during pretrial proceedings.

Bensing's records were later corrected, but there was no provision in regulation or otherwise for an explanation to be provided to subsequent promotion boards which would indicate that Bensing had not been considered by a preceding promotion board due to the incorrect Promotion Service List Date. The practical result was that Bensing would be viewed by a promotion board as an officer who had not been promoted by a prior promotion board, although Bensing's military personnel records (at this later date after the correction) would have indicated consideration. Following this non-selection after apparent, but non-existent, promotion consideration in FY 1961, Bensing's military personnel records were indelibly "marked" in that his records would always be mistakenly judged by all subsequent promotion boards as those of an officer who, having failed to perform on the same level as his contemporaries, should be judged with other non-selected officers and with younger and less experienced officers who later became eligible for promotion.

III

CERTIORARI SHOULD BE GRANTED BECAUSE: IMMEDIATELY UPON THE IMPLEMENTATION OF THE 1956 STATUTE, RETROACTIVELY GRANTING PROMOTION CREDIT FOR WARTIME SERVICE ONLY TO THOSE WHO WERE 21 YEARS OF AGE DURING SUCH SERVICE, BENSING'S RELATIVE POSITION FOR PROMOTION, HIS TIME-IN-GRADE, AND HIS RANK DROPPED DRASTICALLY COMPARED TO THAT OF HIS WARTIME CAREER CONTEMPORARIES WHO WERE 21

YEARS OF AGE DURING WORLD WAR II AND RECEIVED THE RETROACTIVE PROMOTION CREDIT FOR WORLD WAR II COMMISSIONED SERVICE WHICH BENSING WAS DENIED. NO SUCH PROVISION WAS INCORPORATED IN THE 1947 ACT UNDER WHICH BENSING RECEIVED APPOINTMENT TO A REGULAR COMMISSION IN 1972. THE 1947 ACT PROVIDED CREDIT ONLY FOR COMMISSIONED SERVICE PERFORMED AFTER THE PASSAGE OF THE ACT, A CLEARLY CONSTITUTIONAL AND NONDISCRIMINATORY LEGISLATIVE ENACTMENT EVEN THOUGH NO APPOINTMENT OR CREDIT FOR PROMOTION PRIOR TO AGE 21 WAS PROVIDED. NO RETROACTIVE GRANT OR DENIAL OF CREDIT FOR SERVICE PERFORMED BEFORE THE PASSAGE OF THE ACT WAS INCLUDED. BENSING'S CAREER WAS SHATTERED BY THE 1956 RETROACTIVE DEPRIVATION OF RIGHTS, PRIVILEGES AND PROPERTY, AND HIS CAREER CONTEMPORARIES MOVED INEXORABLY AHEAD IN CAREER PROGRESSION. THIS DISCRIMINATORY DEPRIVATION OF PROMOTION CREDIT FOR WORLD WAR II SERVICE ALONE WOULD HAVE PREVENTED NORMAL CAREER PROGRESSION. WHEN COMBINED WITH THE ADMITTED ADMINISTRATIVE ERROR AND THE EFFECT OF THE 1959 OFFICER GRADE LIMITATION ACT (WHICH ALLOWED THE AIR FORCE TO CONVERT PROMOTION CRITERIA BASED UPON "TIME-IN-GRADE" TO A DUAL BASIS OF "PROMOTION LIST SERVICE DATE" AND "TIME-IN-GRADE"). THE RESULT WAS INEVITABLY THE TWO PASSOVERS FOR PROMOTION WHICH REQUIRED HIS INVOLUNTARY EARLY RETIREMENT AS A MAJOR AFTER MANY YEARS OF EXEMPLARY SERVICE TO HIS COUNTRY IN WAR AND PEACE AS A COMMISSIONED OFFICER IN THE ARMED FORCES.

How ridiculous it would have seemed if a congressman in committee hearings preceding the passage of the 1956 Act had said, "Well, obviously we need to give these Regular officers promotion credit for their wartime service as Reserve officers, except of course if they were 21 years of age. If they were under 21 they don't deserve it, even if they were flying four engined combat aircraft as aircrew commanders."

No one said this, of course, because such a statement would be invidious, a patently arbitrary classification utterly lacking in rational justification, and based upon a false and irrational premise, namely, that an officer doesn't deserve to be promoted with his career contemporaries because during the initial portion of his wartime commissioned service he had not reached the magic age of 21 years, even though he had been granted a commission and given command of a four engined bomber in combat. Such discrimination would not have been considered rational during wartime, nor was it more so in 1956; nevertheless, this is precisely what was accomplished in 1956 by 10 U.S.C. 8287. Congress somehow overlooked the irrational nature of the legislation proposed by the Air Force, which in effect provides that reaching the age of 21 years so magically enhances an officers value as to require its adoption as an absolute standard, even retroactively, to deprive an officer of deserved promotion credit earned prior to his reaching that magical age. Obviously, as in the 1947 Act, an age requirement can and should be part of the criteria for appointment to a commission in the armed forces. Furthermore, if Congress in its wisdom decides, as it did in 1947, that the requirement as to age should be 21 years for appointment to a regular commission, no one could rationally argue that the requirement, when applied only prospectively as in the 1947 Act, is discriminatory, even though the present trend in granting privileges and rights as well as property is toward a younger age. But, to reiterate, the retroactive deprivation of rights, privileges and property, as in this case, is clearly an unconstitutional discrimination.

The shattering effects of the Act, in all likelihood not comprehended at the time of its passage, destroyed Bensing's career. Until

the passage of the 1956 Act, his career had moved regularly forward with his career contemporaries, those of his fellow wartime officers who chose to make the service a career, especially after they were recalled to active duty for the Korean Conflict as were Bensing and many of his fellow Reserve officers. Suddenly, with the passage of the 1956 Act, Bensing was to drop 14 months seniority on the promotion list. As if this were not sufficient, the Air Force erroneously computed his new seniority under the Act, moving him back to a Promotion List Service Date of January 19, 1951, instead of the correct date of September 19, 1950. The irreparable damage to his career provided by the Act was compounded and aggravated by this admitted administrative error.

During World War II, pilot trainees who were not considered qualified for commissions were given Flight Officer status similar to that of Warrant Officers. Under then existing congressional enactments providing for commissioning of Reserve officers, the Army Air Corps chose to grant Bensing a commission. Should anyone be heard to say, after the fact of his outstanding wartime combat career, that the commission granted this highly decorated wartime combat crew aircraft commander was somehow inferior to that of his classmates in pilot training and his comrades in arms? Congress has attempted to say so in 10 U.S.C.8287.

An analogy has been drawn, in arguments to support this discriminatory grant of rights, privileges and property, that armed forces regular commissions are normally granted only after the applicant reaches 21 years of age. This has no pertinency to a retroactive grant. A more appropriate analogy would be that of a

statute granting a veterans bonus, pension or preference for wartime services to those who were 21 years of age during the wartime service, and denying the grant to anyone who performed the identical wartime service while under the age of 21. Clearly an unlawful discrimination, analagous to the grant of promotion credit herein.

The lower courts in this case have reasoned, citing appropriate precedents, that the due process clause bars only patently arbitrary classifications utterly lacking in rational justification; that the discrimination herein is not "invidious"; and that legislative classifications will be upheld if they are reasonable, have a fair and substantial relation to the object of the legislation and cause "all persons similarly circumstanced" to be treated alike. We agree wholeheartedly, but find it incomprehensible that Bensing's unwarranted loss of promotion standing could be considered other than "invidious" or likened to that of "all persons similarly circumstanced." These persons who were "similarly circumstanced" can only be his career contemporaries, his classmates, his wartime fellow commissioned officers, who received invaluable rights, privileges and property which he was denied.

This unconstitutional statutory deprivation must be struck down, without further attempts to cloud its true identity, as an irrational, unlawful, unwarranted and unconstitutional age discrimination which has, for too many years and without due process, deprived Bensing of valuable rights, privileges and property.

CONCLUSION

It is indeed ironic that Bensing, having left civilian pursuits on two occasions to wear the uniform of the United States and repeatedly to expose himself to personal hazards through three periods of military conflict, was denied promotion consideration along with officers with whom he had shared combat experiences. And even more ironic was the fact that Bensing's selection to become a Regular officer effectively denied him credit for 14 months of the most hazardous duty experienced by members of the armed service. The effect of the 1956 Act granting Bensing's career contemporaries substantial precedence over him for purposes of career advancement, compounded and aggravated by the admitted error in recomputing his Promotion List Service Date under the 1956 Act, was to terminate his career prematurely, to his considerable damage. His loss of relative position for promotion consideration under the 1956 Act must be characterized as "invidious". Combined with the additional loss of standing caused by the admitted error, the effect was devastating and the predictable result occurred.

Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 76-1125

ROBERT G. BENSING, Plaintiff-Appellant, v. UNITED STATES OF AMERICA, Defendant-Appellee.	Appeal from the United States District Court for the District of Colorado (D.C. No. C-5181)

Submitted: January 26, 1977

John P. Hartman of Booz, Hartman and Lee, Wheat Ridge, Colorado, for Plaintiff-Appellant:

Jerre W. Dixon, Assistant United States Attorney, (James L. Treece, United States Attorney, on the brief), Denver, Colorado, for Defendant-Appellee.

Before McWILLIAMS, BARRETT and DOYLE, Circuit Judges:

BARRETT, Circuit Judge

Robert G. Bensing (Bensing) appeals the dismissal of his complaint and cause of action for declaratory judgment, filed pursuant to 28 U.S.C.A. §2201 and 28 U.S.C.A. §1346.

Bensing sought to have 10 U.S.C.A. §8287 declared unconstitutional insofar as it denied him promotion or retirement credit for commissioned military service performed before his 21st birthday. He also sought damages for the recordation of an erroneous promotion list service date in his personnel file which precluded his being considered for a promotion for one year. The facts are not in dispute and will be developed insofar as necessary for the disposition of the issues presented.

Bensing enlisted in the armed forces in February, 1943. He served on active duty until November, 1945, during which he accumulated approximately 14 months of commissioned service prior to his 21st birthday. This accumulated service could not be considered for promotion or retirement credit under Section 8287, which provides, in part:

> (a) For the purpose of determining grade, position on a promotion list, seniority in his grade in the Regular Air Force, and eligibility for promotion, a person ...shall be credited, at the time of his appointment...
>
> (1) With the active commissioned service in the armed forces that he performed after becoming 21 years of age and before his appointment;

Under Section 8287, Bensing clearly could not receive credit for promotion or retirement for commissioned service accumulated prior to his 21st birthday.

Bensing was recalled into active duty in April, 1951. He served continuously until his involuntary retirement in October, 1971, after he had attained the rank of major. During this period Bensing was erroneously assigned a promotion list service date of January 19, 1951, when in fact his correct promotion list service date was September 19, 1950. As a result of this error, Bensing was first considered for selection to major in 1962 rather than in 1961.

Bensing petitioned that Section 8287 be declared unconstitutional insofar as it deprived him of credit for commissioned service performed prior to his 21st birthday; that he be promoted to the permanent grade of lieutenant colonel with date of rank, back pay, and allowances restored retroactively in accordance with the correction of the recordation of the erroneous promotion list service date; and that he be recalled to active duty at the grade of lieutenant colonel.

Appellee United States responded that Section 8287 was constitutional in that it was enacted to allow reserve officers to obtain benefits they could not obtain in the reserves, including crediting their pre-21 service time for pay, retirement, and longevity. The United States concedes that an administrative error in the recordation of Bensing's promotion list service date delayed his being considered for the rank of major until 1962, when in fact he should have been considered in 1961.

In dismissing the action, the trial court concluded as a matter of law that Bensing had failed to establish that in the absence of the administrative error in the recordation of his promotion list service date he would have been promoted in 1961. The court also concluded that Section 8287 did not create an invidious discrimination violative of Bensing's constitutional rights.

On appeal Bensing contends that (1) Section 8287(a)(1) violates the Due Process Clause of the Fifth Amendment by failing to credit active commissioned service performed prior to one's becoming 21 years of age, and (2) he was wrongfully denied consideration for promotion due to an admitted error in his military records.

I.

Bensing contends that the failure of Section 8287 to give credit, for purposes of promotion and retirement, for commissioned service performed prior to the age of 21, is arbitrary and unreasonable in that it bears no reasonable relation to any legitimate governmental objective. Bensing argues that there is no rational basis for treating people differently for purposes of promotion and retirement, merely because of age difference, when they are performing identical services for their country. Bensing states that age classifications "may be constitutional where they reflect some real difference."

In rebuttal the United States points out that Section 8287 was enacted to allow reserve officers to obtain benefits they would not have obtained in the reserve ranks. It also provides a uniform avenue of computing seniority in grade for regular members of the armed forces, and as such cannot be considered an arbitrary classification of individuals.

We hold that the trial court properly found Section 8287 to be constitutional and valid. The Due Process Clause bars only patently arbitrary classifications utterly lacking in rational justification. Flemming v. Nestor, 363 U.S. 603 (1960). Legislative classifications will be upheld if they are reasonable, have a fair and substantial relation to the object of the legislation, and cause "all persons similarly

circumstanced" to be treated alike. Johnson v. Robinson, 415 U.S. 361 (1974). Statutory classifications will be upheld if they are reasonable, have a fair and substantial relation to the object of the legislation, and cause "all persons similarly circumstanced" to be treated alike. Johnson v. Robison, 415 U.S. 361 (1974). Statutory classifications are set aside only if no grounds can be conceived to justify their existence. McDonald v. Board of Election Commissioners of Chicago, 394 U.S. 802 (1969); McGowan v. Maryland, 366 U.S. 420 (1961). Imperfect classifications do not offend the Constitution simply because in practice they result in some inequality. Dandridge v. Williams, 397 U.S. 471 (1970). See also: Jefferson v. Hackney, 406 U.S. 535 (1972); Gillette v. McNichols, 517 F.2d 888 (10th Cir. 1975); Leggroan v. Smith, 498 F.2d 168 (10th Cir. 1974).

Due process is inherently flexible:

> ...Besides, what is due process of law must be determined by circumstances. To those in the military or naval service of the United States the military law is due process.
>
> Reaves v. Ainsworth, 219 U.S. 296 (1911), at 304.

A court must be ever alert to refuse to sit as a super-legislature to weigh the wisdom of legislation, or to invoke the Due Process Clause so as to strike down laws or regulations simply because the Court may believe that they are unwise or improvident. Ferguson v. Skrupa, 372 U.S. 726 (1963).

Military age classifications are necessarily constitutional:

> ...he claims a violation of the equal protection and due process clauses of the Constitution in that the Selective Service Act does not conscript men in the war industries which profit by war, and exempts men under 18½ and over age 26. This issue has been answered against appellant's contentions. Bolling v. Sharpe, 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed 884 (1954); Goesaert v. Cleary, 335 U.S. 464, 69 S.Ct. 198, 93 L.Ed. 163 (1948); Bertelsen v. Cooney, 213 F.2d 275 (5th Cir. 1954), cert. denied 348 U.S. 856, 75 S.Ct. 81, 99 L.Ed. 674. The equal protection clause, as provided in the Fourteenth Amendment, or as implied in the due process clause of the Fifth Amendment, merely requires that all legislative classifications have a reasonable basis and that everyone placed within a classification be treated similarly. ...
>
> Smith v. United States, 424 F.2d 267 (9th Cir. 1970), at 268-269.

II.

Bensing contends that he was wrongfully denied consideration for promotion due to the recordation of an erroneous promotion list service date in his military personnel records. This point is conceded by the United States. Bensing also contends that the trial court erred in ruling that in order for him to state a claim upon which relief could be granted, he must establish that he was not promoted due to the incorrect promotion list service date. Bensing presents this contention in summary fashion, without cited authorities or cogent argument and without a showing that but for the error he would have been promoted at an earlier date.

We hold that the trial court properly concluded that Bensing had failed to sustain his burden of establishing damages. Bensing was afforded an administrative review by the Secretary of the Air Force acting through the Air Force Board for the Correction of Military Records. We cannot supersede the denial of their relief. As noted in Orloff v. Willoughby, 345 U.S. 83 (1953):

> We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The resporsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. While the courts have found occasion to determine whether one has been lawfully inducted and is therefore within the jurisdiction of the Army and subject to its orders, we have found no case where this Court has assumed to revise duty orders as to one lawfully in the service.

345 U.S., at 93-94,

WE AFFIRM.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

ROBERT G. BENSING, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	)	Civil Action No. C-5181

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

APPEARANCES:

For the Plaintiff: John P. Hartman
12505 West 32nd Avenue
Wheatridge, Colorado 80033

For the Defendant: Jerre W. Dixon
Assistant U.S. Attorney
323 United States Courthouse
Drawer 3615
Denver, Colorado 80202

FINDINGS OF FACT

At the conclusion of the evidence on November 17, 1975, the Court stated its findings of fact into the record and requested counsel to file briefs on the Plaintiff's claim that Title 10, United States Code, Section 8287, deprives the Plaintiff of his rights under the Federal Constitution.

The Court appends hereto a transcript of its findings of fact entered in the record on November 17, 1975 as the findings of fact in this action.

The Court has received and considered the briefs of the parties dealing with Plaintiff's claim that Title 10, United States Code, Section 8287, violates the Plaintiff's right to equal protection of the law under the Federal Constitution. The Court is now fully advised and makes the following conclusions of law:

CONCLUSIONS OF LAW

Upon the facts as found by the Court, the Court concludes as a matter of law:

1. That the Plaintiff failed to sustain the burden of proving damages resulting from the erroneous entry made on Plaintiff's record by Defendant on November 19, 1956, and the Plaintiff is not entitled to recover thereon.

2. That Title 10, United States Code, Section 8287, has a rational basis for the discrimination therein as between those who had service as commissioned officers prior to the age of 21 years, and those commissioned officers who had no such service prior to age 21 years, and the discrimination therein is not "invidious", and

does not and did not violate the Plaintiff's Federal Constitutional rights.

3. That judgment of dismissal of the Complaint herein and all claims set forth therein should be entered.

It is, therefore,

ORDERED that final judgment of dismissal of the Complaint and all claims therein shall forthwith enter.

ENTERED this 23rd day of December, 1975.

BY THE COURT:

HATFIELD CHILSON, Judge
United States District Court

APPENDIX C

FEDERAL STATUTES, RULES AND REGULATIONS INVOLVED

1. Title 10, § 8287, Section 207 of the Regular Officer Augmentation Act of 1956.

   Commissioned officers - Original Appointment - Service Credit.

   (a) For the purpose of determining grade, position on a promotion list, seniority in his grade in the Regular Air Force, and eligibility for Promotion, a person originally appointed in a commissioned grade in the Regular Air Force, other than a person appointed with a view to designation as a medical or dental officer or as an Air Force nurse and medical or dental officer or as an Air Force nurse or medical specialist, shall be credited, at the time of his appointment,
   (1) with the active commissioned service in the armed forces that he performed after becoming 21 years of age and before his appointment. ...

2. Section 506 (c) of the Armed Forces Regular Officer Augmentation Act of 1947, (repealed by the 1956 Act, above).

   (c) For the purpose of determining grade, position on promotion list, permanent grade seniority, and eligibility for promotion,

each person initially appointed and commissioned as officer in the Regular Army shall, at time of appointment, be credited with an amount of service equivalent to the total period of active Federal service performed after attaining the age of twenty-one years as a commissioned officer in the Army of the United States or any component thereof subsequent to December 31, 1947, and prior to such appointment...

3. Legislative History of Section 203(d) Regular Officers Augmentation Act of 1956, U.S. Code Congressional and Administrative News, 1956, at page 3369.

   (d) PROTECTION OF PROMOTION SENIORITY OF ACADEMY GRADUATES WITH CONTINUOUS SERVICE

   The purpose of this subsection is to insure the promotion seniority of Academy graduates now on the Regular list with regard to classmates who may receive Regular appointments under this title. It provides for two things: (1) That no person who was a cadet at one of the Adademies may be appointed with a date of rank prior to the date received by his classmates who were graduated and appointed as officers, and (2) that no person who was a cadet but did not graduate from an Adademy may be credited with a longer period of promotion-list service at the time of his appointment than is credited to his former classmates now on the Regular List. This subsection is a restatement of existing law.

4. Legislative History of 10 U.S.C. 8202, 1959 Officer Grade Limitation Act, U.S. Code Congressional and Administrative News, 1959, at page 2694.

CHANGE IN TEMPORARY PROMOTION SYSTEM TO THE GRADE OF MAJOR

The additional vacancies authorized under this legislation will afford the Air Force an opportunity for revising administratively its present criteria for consideration to the grade of temporary major. Up until the present time officers have been placed in the zone for consideration for temporary major based upon the time in their current grade. The time-in-grade criteria was considered by the Air Force to be the only method whereby large numbers of Reserve officers could compete with Regular officers.

With the enactment of this legislation, the Air Force would thereafter provide that consideration for promotion to temporary major will be based upon total active commissioned service rather than time in grade.

5. Section 27, Public Law 85-861, 1957, Amending 10 U.S.C. 8287, 8888 and 8927.

Notwithstanding any other provision of law, the years of service credited to an officer of the Regular Air Force on July 20, 1956, for the purposes of Section 8287, 8888 (2) (A)-(C) and (E)-(G), and 8927(a) (1)-(3) and (5)-(7) and (b)(2) of Title 10, United States Code (this section and sections 8888(2) (A)-(C), (E)-(G) and 8927(a) (1)-(3), (5)-(7), (b)(2) of this title), may be increased but not by more than two years, under regulations to be prescribed by the Secretary of the Air Force.

Supreme Court, U. S.
FILED
AUG 9 1977
MICHAEL RODAK, JR., CLERK

No. 76-1775

In the Supreme Court of the United States

OCTOBER TERM, 1977

ROBERT G. BENSING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1775

ROBERT G. BENSING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a former officer in the regular Air Force, was involuntarily retired in 1971 as a major. He contends that he should be returned to active duty as a lieutenant colonel.

1. In February 1943, petitioner, then 18, entered the Armed Forces. On March 12, 1944, he was commissioned as a second lieutenant in the Army Air Corps. He became 21 on May 18, 1945, after 14 months of commissioned service. He was released from active duty to the reserve six months and ten days after his 21st birthday.

Petitioner was recalled to active duty in April 1951. On October 15, 1952, he accepted an appointment as a second lieutenant in the regular Air Force. He remained on active duty until his involuntary retirement in October 1971,

after having twice been passed over for promotion to the rank of lieutenant colonel.

In 1973 petitioner filed this suit in the United States District Court for the District of Colorado seeking an order requiring his retroactive promotion to the permanent grade of lieutenant colonel and his recall to active duty. He claimed that he would have been considered for promotion to major prior to 1962, and thus would have been more favorably considered by subsequent promotion boards, if (1) the Air Force had not, in computing his promotion list service date ("PLSD") erroneously failed between November 1956 and January 1961 to credit him with the six months and ten days of active commissioned duty he served between his 21st birthday and his release in 1945; and (2) Congress had not denied him equal protection of the law by providing in Section 207 of the Armed Forces Regular Officer Augmentation Act of 1956, 70 Stat. 586, now 10 U.S.C. 8287 (a)(1), that active commissioned service prior to the age of 21 may not be credited in determining grade, position on promotion lists, or seniority in grade.

After trial, the district court found that petitioner had failed to prove any damages from the erroneous entry of the PLSD date in his service record and that 10 U.S.C. 8287 had a rational basis for not accrediting active commissioned duty served prior to the age of 21 (Pet. App. 9a-10a). The court of appeals affirmed (Pet. App. 1a-7a).

2. Petitioner's contention that he was denied promotion due to the error in his PLSD date presents no general issue of public importance and is, in any event, without merit. Petitioner claims that but for that error, he would have been considered for promotion in 1961 rather than 1962. But in 1961, petitioner, then a captain, would

have been eligible for temporary promotion only from the so-called "secondary zone," which is "a means whereby exceptionally well qualified officers with less service than those in the primary zone may be promoted before their contemporaries. * * *" Section 9e(b), Air Force Reg. No. 36-89 (June 10, 1960). No officer is entitled to such advancement, and no officer suffers prejudice from not having received it. Furthermore, such a "temporary promotion has no effect upon an officer's permanent grade, * * *." Section 3, Air Force Reg. No. 36-89, *supra*.

Petitioner's suggestion that, but for the subsequently corrected error in his PLSD date, he would have received early temporary promotion in 1961 is unsupported speculation. The argument was considered and rejected by the body created to review such claims, the Air Force Board for the Correction of Military Records (Pet. App. 7a). In denying relief, the courts below properly observed the limitations on judicial review of matters pertaining to the promotion of officers in the armed forces. See, *e.g.*, *Brenner* v. *United States*, 202 Ct. Cl. 678, certiorari denied, 419 U.S. 831; *Boyd* v. *United States*, 207 Ct. Cl. 1, certiorari denied, 424 U.S. 911.

3. Petitioner's claim that 10 U.S.C. 8287(a) unconstitutionally discriminates against World War II officers with commissioned service prior to the age of 21 also is without merit. The Officer Personnel Act of 1947, which became effective December 31, 1947, provided in Section 506(c), 61 Stat. 890, that henceforth commissions in the Regular Army would be granted only to persons 21 years of age or over. The Act made no provision for the accreditation to regular officers appointed after its effective date of commissioned

service in World War II.[1] This provision was effective and applicable to the Air Force when petitioner accepted his commission as a regular officer in 1952. In the Armed Forces Regular Officer Augmentation Act of 1956, 70 Stat. 584-585, now 10 U.S.C. 8287(a),[2] Congress provided accreditation for such service in World War II, after the age of 21. See S. Rep. No. 2420, 84th Cong., 2d Sess., p. 8 (1956). Congress thereby sought to ensure that regular officers appointed after 1947, but who had been commissioned prior to the age of 21 during World War II, did not enjoy any

---

[1]Section 506(b) and (c) of the 1947 Act provided:

> (b) All persons appointed officers in the Regular Army pursuant to this section shall be citizens of the United States, at least twenty-one years of age, of good moral character, physically qualified for active military service, and shall have such other qualifications as may be prescribed by the Secretary of War.
>
> (c) For the purpose of determining grade, position on promotion list, permanent grade seniority, and eligibility for promotion, each person initially appointed and commissioned an officer in the Regular Army shall, at time of appointment, be credited with an amount of service equivalent to the total period of active Federal service performed after attaining the age of twenty-one years as a commissioned officer in the Army of the United States or any component thereof subsequent to December 31, 1947, and prior to such appointment, but in no event shall any person be credited for such purposes with more than five years of such service. * * *

[2]10 U.S.C. 8287(a) provides in pertinent part:

> For the purpose of determining grade, position on a promotion list, seniority in his grade in the Regular Air Force, and eligibility for promotion, a person originally appointed in a commissioned grade in the Regular Air Force, other than a person appointed with a view to designation as a medical or dental officer or as an Air Force nurse or medical specialist, shall be credited, at the time of his appointment—
>
> (1) with the active commissioned service in the armed forces that he performed after becoming 21 years of age and before his appointment.

special advantage in the competition for promotion because of their service prior to the age of 21. Since Congress necessarily must have very broad latitude in matters relating to the seniority of professional military officers, and the classification has a rational basis, the statute is valid. *Johnson* v. *Robison*, 415 U.S. 361.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1977.